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IN THE

Supreme Court of the United States

October Term, 1965.

No. 262

MICHAEL KUBERSKI,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

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No. .....

MICHAEL KUBERSKI,

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NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Justices of the Supreme Court of the United States:

Petitioner, Michael Kuberski, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered April 13, 1966, vacating the judgment of the United States District Court for the Northern District of New York entered on Petitioner's jury verdict on September 30th, 1964, in favor of Petitioner and against the Respondent in the amount of $20,000.00 and dismissing Petitioner's Complaint.

Opinions Below

The District Court rendered no opinion in this matter. The proceedings on Respondent's motion for a judgment *n. o. v.* or a new trial and the District Court rulings thereon are set forth in Pages 320a-355a of the Appendix. The opinion of the United States Court of Appeals for the Second Circuit is unreported at printing, but is set forth in full in the Appendix to this Petition at Pages 17-27. The judgment of the United States Court of Appeals for the Second Circuit is set forth in full in the Appendix to this Petition at Page 28.

Jurisdiction

Petitioner's action against Respondent was brought under the Federal Employer's Liability Act (Title 45, U. S. C. § 50-54).

Jurisdiction of this Honorable Court is invoked pursuant to Supreme Court Rule 19, Section 1, sub-paragraph (b). on the grounds that the Decision of the Court of Appeals is in direct conflict with numerous applicable decisions of this Court and on the further grounds that the decision of the Court of Appeals has abrogated Petitioner's right to a jury determination of facts controlling the question of liability.

Question Presented for Review

1) Was there sufficient evidence of negligence to sustain Petitioner's jury verdict in the District Court?

Constitutional Provisions and Statutes Involved

Federal Employer's Liability Act, Title 45 U. S. C., Sec. 51:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Terri-

tories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 695, § 1, 53 Stat. 1404."

Statement of Facts

The critical issue before this Court is whether there was sufficient evidence within reason upon which the jury could have found that a motor car or scooter with special door pulling equipment aboard was not "readily accessible" to a car inspection crew at the time of Petitioner's accident. Proper perspective and focus upon this issue requires a somewhat more detailed recitation of facts.

Petitioner was a car inspector in Respondent's DeWitt (Syracuse, N. Y.) yards. Petitioner, in keeping with Respondent's rules, was required to see that all boxcar doors

were closed before a train left the yard. Respondent's supervisory personnel knew that car inspectors would attempt to close whatever doors they could manually and if they couldn't just push them aside, call to their partner on the other side of the train to assist them. Respondent furnished only a small wrench and hand light to car inspectors, the wrench being entirely inadequate for the closing of car doors. Respondent had a rail car [herein called a 'motor scooter'] in its DeWitt yard which carried heavy specialized equipment specifically designed for the closing of car doors. Respondent's Terminal Superintendent Martin and Yard Foreman Kimber both testified to the effect that the purpose of the motor scooter, in keeping with "good railroad practice", was to accompany the inspectors while a train was being inspected and assist them in the closing of car doors.

Petitioner reported to work in Respondent's westbound advance yards at DeWitt at 11:00 P. M. on August 24, 1960. Respondent's Yard Foreman Kimber ordered Petitioner and the three other car inspectors to inspect a train known as the "Buffalo Extra" at 11:25 P. M. The train, which had been ready for inspection since 9:45 P. M., *was the only train in the yard being inspected at the time* and was due out at 1:00 A. M. The "Buffalo Extra" did not leave the yard until approximately 1:30 A. M.

The train had been "humped" and it was expected that some boxcar doors would, consequently, have been jarred open. Petitioner was ordered to inspect the south side of the "Buffalo Extra", which was standing on Track No. 1, while his partner, one Barth (who was deceased at the time of the trial) was ordered to inspect the north side, both men proceeding from east to west. The adjacent track on Barth's side, known as No. 2, was clear. Nevertheless, the motor scooter was not on Track No. 2 as the inspection

was undertaken. Foreman Kimber did not remember whether or not he had ordered the motor scooter to accompany the men inspecting the "Buffalo Extra" and did not know where the motor scooter was at the time of the accident. No proof was offered by Respondent as to where the motor scooter actually was at the time of Petitioner's accident.

Petitioner had inspected twelve to fourteen cars when he was summoned to the north side of the train by a call from Mr. Barth for assistance in closing an open boxcar door at approximately 12:15 A. M. on August 25, 1960. The area in which Petitioner was working was very dark. Petitioner elected to cross to the north side of the train by climbing over couplers between two cars. Petitioner carried his wrench in one hand and his hand light in the other hand. Using both hands to clutch grab irons resulted in Petitioner's lantern being high above his head rather than shining on the coupler where he was stepping. Petitioner testified that he couldn't see what he was stepping on and that as he put his right foot on top of the coupler, he missed his footing and fell to the ground on the other side of the train. Petitioner immediately experienced pain in his left leg and testified that his left knee locked. Barth went to seek aid and about ten minutes later the motor scooter showed up on Track No. 2. Petitioner was placed aboard the motor scooter and taken back to the yard office.

Since the Court of Appeals has indicated that evidence of injury and damage were sufficient to sustain Petitioner's $20,000.00 jury verdict, we shall not discuss the facts touching upon those subjects.

It was Petitioner's theory in the Trial Court that Respondent's negligent failure to assign the motor scooter

to accompany the car inspectors and the failure to have the motor scooter with the specialized door pulling equipment aboard readily available had occasioned Barth's call for assistance and consequently Petitioner's perilous crossing of the couplers in total darkness where he missed his footing, causing him to fall to the ground and be injured. Recognizing the gravamen of the lawsuit, the District Court charged the jury:

> "Now all of those claims center around the claim that this motor car was not available. Now it is for you to determine whether that motor car was or was not available in accordance with what would be the duty of the railroad to exercise reasonable care. That is one of the questions of fact that you will have to decide."

The jury resolved the fact question in Petitioner's favor and the Trial Court denied Respondent's motion for judgment *n. o. v.* or a new trial.

Both the majority and the dissent in the Court of Appeals focused upon the narrow question of whether there was any evidence to support the jury finding that the motor scooter was not "readily accessible." Twelve jurors on hearing the evidence and viewing the witnesses found that it was not. The Trial Court and the dissenting justice in the Court of Appeals found sufficient evidence to justify the jury's conclusion as to the fact that it was not "readily accessible". Nevertheless, the majority of the Court of Appeals has ruled that the evidence permits only the conclusion that the motor scooter was, in fact, "readily accessible".

ARGUMENT

The decision of the United States Court of Appeals for the Second Circuit should be reviewed by this Court because it directly conflicts with the clear mandate and mainstream decisions in this Court which have in substance laid down the rule that the jury and jury alone may determine the fact question of negligence in Federal Employer's Liability Act suits.

In *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409, Justice Murphy said at Page 35:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. Ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co. supra (318 U. S. 68, 87 L. Ed. 618, 63 S. Ct. 444, 143 AlR 967); Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740 Justice Murphy, again speaking for the Supreme Court, said at Page 653:

> "* * * Whenever the facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Despite the clear mandate of *Tennant* and *Lavender*, the majority of the Second Circuit reviewed the evidence and decided—

> "A reasonable man could only infer from the fact the scooter arrived ten minutes after Barth went for help that it was in the immediate area * * * On such a record, a scooter that appears within ten minutes after it is summoned must be considered to have been readily accessible * * *"

We submit that the learned Court below has not taken a fair view of the evidence.

The railroad supervisory personnel testified unequivocally that it was the function of the motor scooter with heavy door pulling equipment aboard to accompany the car inspectors and that it was "good railroad practice" to do so. Track No. 2 on the north side of the train was clear and available for use by the scooter at the time of Petitioner's accident. Yet Respondent's yard foreman Kimber, who was charged with supervision of the work in the yard and had the right to control the whereabouts of the scooter, did not remember assigning the scooter to accompany the inspectors on the night of Petitioner's accident. The fact

was that the scooter was not on Track No. 2 and no one knew where it was at the time Barth needed it to help him close a car door. If the scooter had been legitimately occupied elsewhere in the yard, Respondent could and should have produced such evidence. Petitioner who had no control over the scooter, naturally didn't know where it was. The Respondent chose not to produce the scooter operator to testify where the scooter was when it was needed by Barth and Petitioner. Certainly in the absence of any testimony as to where the scooter was at the time of the accident, the clear track at the scene of the accident, the ten minute delay before it arrived after the accident, all coupled with the fact that there was no testimony by the foreman that it had been assigned to accompany the inspectors on the Buffalo Extra, entitled the jury to find that Respondent had negligently failed to provide Petitioner with sufficient tools and equipment directly precipitating his risk and injury.

The Second Circuit majority made an allusion to the situation of an office secretary arriving after her boss buzzes for her as conclusive proof that she was in the office at the time she was summoned. Such may be a permissible inference, but it is by no means the only permissible inference.

In the case at bar, there was proof before the jury that the general yard office was about 750 feet from the scene of the accident. Door pulling equipment was available at the yard office, but the Second Circuit opinion does not suggest that equipment 750 feet away from the place of its need was "readily accessible". We submit furthermore that the jury was entitled to apply a little practical mathematics to the time element of the scooter's appearance and conclude that the scooter with the necessary equipment aboard may have been a half of a mile away from the

place of need at the time of Petitioner's accident. For example, the jury could reason that Mr. Barth was capable of proceeding at five miles per hour searching for the missing scooter and that the scooter was capable of proceeding at twenty miles per hour to the scene of the accident and applying basic algebra, conclude that Barth found the scooter 3600 feet away from the scene of the accident. If the Second Circuit did not feel that door pulling equipment 750 feet from the scene of the accident at the yard office was "readily accessible", we fail to see how they can reason that a scooter over half a mile away from the scene when it was needed was readily accessible. Certainly, the mathematics of the situation permitted the jury as reasonable and fair minded men to conclude as we have just suggested that the scooter was far remote from its proper place at the time of Petitioner's accident.

The dissenting opinion of Judge Hayes in the Second Circuit clearly indicates the testimony upon which reasonable and fair minded jurors could and did conclude that the motor scooter was not readily accessible in keeping with the admitted good railroad practice and the normal procedure in the DeWitt yard of accompanying the car inspectors during the inspection of a train.

Petitioner's burden was satisfied when he proved to the jury's satisfaction that employer negligence played a part, even though slight, in producing the injuries for which damages were sought. *Rogers v. Missouri-Pacific Railroad Co.*, 1957, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443. In *Rogers* the Plaintiff had been burning weeds on the right-of-way with a hand torch. A passing train fanned the flames in the weeds causing Rogers to retreat and fall into a culvert. This Court, speaking through Mr. Justice Brennan reasoned that the immediate cause of Roger's fall into the culvert was totally irrelevant because the

Railroad had placed him in his precarious position by failure to use proper weed burning equipment. Justice Brennan said at page 503:

> "* * * These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did. * * *"

Despite the clear language of *Rogers,* the Second Circuit has ruled as a matter of law that failure to have the motor scooter with the necessary equipment aboard at the scene of Kuberski's accident in keeping with admitted good railroad practice played no part in Petitioner, Kuberski's accident. We submit, however, that as in *Rogers* the jury was entitled to find that employer negligence in failure to order the scooter to accompany Petitioner and Barth and in failure to have the scooter at the scene of the accident when it was needed created a foreseeable risk of harm to the injured employee and consequently played a part in Petitioner's accident.

Accepting the facts as outlined by the majority of the Court of Appeals, there are obviously conflicting inferences upon the record. This Court has clearly stated that resolution of the conflicting inferences and conclusions is peculiarly the province of the jury. We can think of no clearer statement than that of Mr. Justice Black in *Schulz v. Pennsylvania Railroad Co.,* 1956, 350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608, at Page 526:

> "* * * Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And * * * that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties * * * For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most

> reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

A jury of twelve upon a charge acceptable to the railroad resolved those conflicts in Petitioner, Kuberski's favor. The posture of this case in the Court of Appeals, therefore, should have been as stated by Judge Wisdom in *Waterman Steamship Corporation v. David,* 353 F. 2d 660, at Page 664:

> "It is the 'duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them,' and 'to reconcile the jury's finds by exegesis if necessary * * * before we are free to disregard the jury's special verdict and remand the case for a new trial.' Gallick v. Baltimore & Ohio R. Co. (1963), 372 U. S. 108, 119, 83 S. Ct. 659, 666, 9 L. Ed. 2d 618. If 'there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.' Atlantic & Gulf Stevedores Inc. vs. Ellerman Lines Ltd. (1962), 369 U. S. 355, 364, 82 S. Ct. 780, 7 L. Ed. 2d 798."

This Court has zealously and consistently protected the rights of an F. E. L. A. litigant to a jury determination of facts, taking a liberal view of what constitutes a fact question of negligence.

Bearing in mind the narrow issue raised by the Court of Appeals, *viz:* whether the motor scooter was or was not "readily accessible" we refer to but a few of the many decisions of this Court, all of which have reversed Appellate Courts and reinstated jury verdicts for injured F. E. L. A. litigants, showing analogous scope of jury factual determination.

In *Wilkerson v. McCarthy,* 1949, 336 U. S. 53, 93 L. Ed. 497, 69 S. Ct. 413, the Utah Courts [187 P. 2nd 188] upheld a directed verdict concluding that a chain across a pit in Defendant's car shops was equivalent to Company orders not to cross the pit on a board and that there was insufficient evidence of knowledge that switchmen had continued to use the board. In reversing Judge Justice Black said at Page 60:

> "* * * Thus the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict."

In *Arnold v. Panhandle & Santa Fe Railway Co.,* 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, reh. den. 354 U. S. 927, 1 L. Ed 2d 1441, 77 S. Ct. 1375, the Court was concerned with the question of whether a car inspector had been furnished a safe place to work, the problem arising because the jury had found a general verdict for the injured employee, but for the Defendant Railroad on the special issue of negligence involving the operation of a truck. In a *Per Curiam* decision this Court reversed the Supreme Court of Texas [283 S. W. 2nd 303] noting:

> "* * * The jury's general verdict, * * * has support in the testimony of witnesses justifying the inference that the passageway *as used* was not a safe place for the petitioner to work. * * * The findings on these special issues do not exhaust all the possible grounds on which the prior unsafe-place-to-work finding of the jury may have been based. * * *" (Emphasis ours.)

Thomson v. Texas & Pacific Railway Co., 353 U. S. 926, 1 L. Ed. 2d 722, 77 S. Ct. 698 reversing the Fifth Circuit (232 F. 2d 313), was a case where the injured worker had failed to offer any evidence aside from her complaint in

support of a charge that she had been denied assistance in lifting heavy mail bags causing a back injury.

Shaw v. Atlantic Coast Line Railroad Co., 353 U. S. 920, 1 L. Ed. 2d 718, 77 S. Ct. 680 reversing the Fourth Circuit (238 F. 2d 525), involved a claim that shrubbery located some 25 feet from adjoining tracks had obstructed the view of a railroad conductor and contributed to his being run down by an oncoming train.

Dennis v. Denver & Rio Grande Western Railroad Co., 375 U. S. 208, 11 L. Ed. 2d 256, 84 S. Ct. 291 reversed the Utah Courts (372 P. 2nd 3), in a case where a track worker had suffered frost bite while working to repair track on a cold night, the question being whether Defendant knew that Plaintiff had failed to dress himself as warmly as the other workers.

Gallick v. Baltimore and Ohio Railroad Co., 1963, 372 U. S. 108, 9 L. Ed. 2d 618, 83 S. Ct. 659 reversed the State Courts of Ohio (173 N. E. 2d 382), on the question of the jury's right to find that an insect which caused Plaintiff's injuries came from a pool of contaminated stagnant water negligently permitted to remain on Defendant's property.

Basham v. Pennsylvania Railroad Co., 1963, 372 U. S. 699, 10 L. Ed. 2d 80, 83 S. Ct. 965 reversed the State Courts of New York (183 N. E. 2nd 704), where Plaintiff's jury verdict had been set aside on the grounds that the evidence conclusively demonstrated that it was physically impossible for the accident to have happened as Plaintiff claimed it did. This Court, however, took the view that it was for the jury, not the Court to decide whether or not it was physically possible for the accident to have happened as Plaintiff claimed.

Webb v. Illinois Central Railroad Co., 1957, 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451 reh. den. 353 U. S. 943, 1 L. Ed. 2d 764, 77 S. Ct. 809 reversed the Seventh Circuit (228 F. 2d 257), and reinstated Plaintiff's jury verdict in a case involving a fall on a large partially covered cinder imbedded in the roadbed, the question being whether it was negligent to have a large cinder in a roadbed.

Pauly v. McCarthy, 1947, 330 U. S. 802, 91 L. Ed. 1261, 67 S. Ct. 962 reversed the State Courts of Utah (166 P. 2nd 501), and reinstated Plaintiff's jury verdict for injuries sustained when Plaintiff dropped from the side of a caboose into a space past the edge of a bridge down to a creek bed in darkness, the question being whether the employee had been furnished a safe place to work.

Anderson v. Atlantic Coastline Railroad Co., 1955, 350 U. S. 807, 100 L. Ed. 725, 76 S. Ct. 60 reversed the Fifth Circuit (221 F. 2d 548), and reinstated Plaintiff's jury verdict in a case involving a question of whether Plaintiff's decedent was crushed by a moving car solely as a result of his own negligence or whether the negligence of the railroad played any part in the fatal accident.

Moore v. Terminal Railroad Association of St. Louis, 1958, 358 U. S. 31, 3 L. Ed. 2d 24, 79 S. Ct. 2 reversed the State Courts of Missouri (312 S. W. 2d 769), and reinstated Plaintiff's jury verdict in a case where a Plaintiff pulling a hand cart along a station platform was struck by a moving train, the question being whether the accident was caused solely by Plaintiff's own negligence in management of the hand cart.

Certainly these cases espouse a rule broad enough to protect Petitioner Kuberski's right to have the jury determine the simple fact question of whether or not the motor

scooter was "readily accessible". The circumstance of Foreman Kimber not remembering whether he assigned the motor scooter to accompany Petitioner, not knowing whether the motor scooter was at the time of the accident, the fact that it was not where it was needed when the accident occurred and the fact that it took approximately 10 minutes to find it after an emergency (Petitioner's accident) arose, provided evidentiary basis to satisfy and persuade the jury that the Respondent was negligent and that its negligence had played at least a part in Petitioner's accident.

Conclusion

The Petition for Certiorari to the United States Court of Appeals for the Second Circuit should be granted and its judgment reversed, reinstating the judgment of the District Court.

Respectfully submitted,

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APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 40—September Term, 1965.

(Argued October 7, 1965 Decided April 13, 1966.)

Docket No. 29412

MICHAEL KUBERSKI,
Plaintiff-Appellee,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-Appellant.

BEFORE: LUMBARD, *Chief Judge,* WATERMAN and HAYS, *Circuit Judges.*

Appeal from the United States District Court for the Northern District of New York, Port, *J.*, with a jury. Defendant appeals from the denial below of its motion for a directed verdict in its favor on the ground that there had been no proof that defendant had been in any way negligent. Reversed with instructions that judgment be entered for the defendant.

Fenton F. Harrison, Gaughan, Lankes & Baum, Coffey, Heffernan & Harrison, Buffalo N. Y., for Plaintiff-Appellee.

Howard G. Munson, Hiscock, Cowie, Bruce, Lee & Mawhinney, Syracuse, N. Y., for Defendant-Appellant.

WATERMAN, *Circuit Judge:*

Chief Judge Lumbard, who joins with me in this opinion, and I are both of the belief that the plaintiff failed to prove any negligence on the part of the defendant railroad that contributed in any way to the plaintiff's injury, and that the trial judge, after a jury verdict for the plaintiff, should have granted the railroad's motion for a directed verdict and for judgment notwithstanding the verdict.

Michael Kuberski, the plaintiff-appellee, had been employed by the defendant-appellant railroad since 1941 and had worked as a car inspector since 1942. One of the duties of a car inspector is to close all open doors of boxcars befor a train leaves the yards. On August 24, 1960, the night of his injury, the plaintiff was inspecting a train known as the "Buffalo Extra" in the defendant's DeWitt yards. The jury could have found that this night this inspection had been delayed and some speed in carrying it out was required. Morevoer, the train had been "humped," and it was likely that some of the boxcar doors would have been jarred open in this process. Plaintiff started on the south side of the train, his partner Barth started on the north side, and in tandem they proceeded to inspect each car, moving from east to west along the train. Two other inspectors were simultaneously inspecting other cars on the same track.

Barth and the plaintiff had in this manner inspected between twelve and fourteen cars when Barth called for assistance in closing an open boxcar door. The plaintiff responded to this call and began to climb over the coupler between the cars in order to reach the north side where he would be in a position to help Barth. The plaintiff testified that in thus climbing between the cars he used both hands to clutch "grab irons" and that consequently the hand torch

he carried shone above his head and not on his potential footholds. He testified that he placed his left foot on an operating lever some three feet above the ground, then pulled himself up to put his right foot on top of the coupler, and then fell forward onto the ground on the north side of the train, injuring himself.[1] He testified he could not see where he was stepping and admitted he could not be sure whether he had tripped or slipped, and made no claim that he had done either. In fact, he candidly admitted he did not really know how his fall occurred.

As a consequence of this injury the plaintiff worked less than full time during the four years from the accident to the trial and lost approximately $2,000 a year in wages; he also incurred certain medical expenses, and there was testimony tending to prove that he suffered a permanent partial disability. Action was commenced in the Northern District of New York against the railroad, under the Federal Employers Liability Act, 45 U. S. C. §§ 51-60, to recover damages for these injuries. Trial was held before Judge Port and a jury in the latter part of September 1964 and resulted in a general verdict for plaintiff in the amount of $20,000. The defendant appealed, contending, *inter alia*, that the verdict should have been set aside and the complaint dismissed because the plaintiff failed to prove negligence on the part of the defendant. We agree, and reverse with instructions that judgment be entered for the defendant.

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[1] On direct examination plaintiff testified:

> Well, I placed my left foot on the operating lever which is on my side. I placed my left foot there and as I pushed myself with my right foot, because it is about 36 inches or so off the ground, I went over to put my right foot on top of the coupler when just something happened where I—well, I just fell and I found myself on the other side of the car, and I fell on my right knee, and that is where I sat.

On cross examination his testimony was similar, and several times he admitted that he did not know how the accident occurred.

There is absolutely no evidence in the record tending to show that the operating level on which the plaintiff stepped, or the coupler, or any other equipment, was defective. Indeed, plaintiff specifically states in his brief that he makes no claim that there was any defect in either the lever or the coupler. Moreover, the record is devoid of evidence tending to show that it was negligent of the defendant to allow car inspectors to perform their duties in a yard illuminated as was the DeWitt yard on the night plaintiff was injured, and in plaintiff's brief he states that it was no part of his claim that "darkness *per se* was the cause of his injury." No jury could have found that improper lighting was in any sense the cause of the injury, there being no evidence to support such a finding. In F. E. L. A. cases a minimal scintilla of evidence may support a jury verdict, but we ought not to sustain verdicts that can only be based on speculation.

Undaunted by this lack of evidence of any negligence on the part of the carrier, the plaintiff argues there is sufficient evidence to support the jury's verdict on the theory that the railroad was negligent in failing to have a motor scooter supplied with door closing equipment accompany him and his partner as they carried out their appointed task. Had such a scooter been present, plaintiff argues, Barth would not have required any assistance in closing the door, for Barth could have helped himself to a door puller from the scooter and closed the door himself. Plaintiff claims the testimony at trial established that a scooter with door closing equipment usually accompanied car inspectors and that it was "good railroad practice" to have a scooter do so. From this premise he goes on to argue that a jury could fairly conclude that the railroad should have foreseen that if the scooter did not accompany the car inspectors an in-

spector might be tempted to cross between the cars in order to aid his partner in manually closing a door, and should have foreseen the attendant risk that the inspector in so crossing at night might miss his footing and fall. Petitioner concludes that this evidence is enough to support the jury's verdict since the jury question involved is "whether there was evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm." *Gallick v. B. & O. R. R.*, 372 U. S. 108, 116 (1963); *Inman v. B. & O. R. R.*, 361 U. S. 138 (1959); *Rogers v. Missouri Pac. R. R.*, 352, U. S. 500, 506-07 (1957).

This ingenious theory has, however, certain fatal limitations. As we previously noted, the record is devoid of evidence tending to show that the equipment on which the plaintiff stepped was defective. And there is no evidence tending to show the DeWitt yard, illuminated as it was, was not a safe place to work. It is fundamental in F. E. L. A. cases that the fact an employee is injured is not proof of negligence of the carrier. *Moore v. Chesapeake & O. Ry. Co.*, 340 U. S. 573, 577-78 (1951). Here if there were negligence plaintiff would ground it upon defendant's failure to have a scooter loaded with door-closing equipment *accompany* the plaintiff and his partner. If, as the plaintiff urges, it was good industry practice to have a scooter *accompany* each pair of inspectors we would have no trouble concluding that there had been a failure to comply with that practice. But the record establishes only that it was good industry practice to have a motor scooter *readily accessible* to the two or three pairs of car inspectors that ordinarily inspected a train the length of the "Buffalo Extra"; it does not establish that it was good industry prac-

tice to have a scooter *accompany* each pair of inspectors.[2] If "good industry practice" is to be the touchstone differentiating negligent from non-negligent conduct, it would seem to be imperative for the plaintiff to prove that the scooter, contrary to good industry practice, was not *readily accessible* to him and his partner. This the plaintiff has not done. Indeed, the evidence suggests that the scooter, arriving so soon after the accident, was readily accessible to all the inspectors working on the train that night.

Of course, industry practice is not always the measure of proper diligence. In some cases "a whole calling may have unduly lagged in the adoption of new and available devices." *The T. J. Hooper*, 60 F. 2d 737, 740 (2 Cir. 1932). In such cases courts have properly felt free to hold that higher standards are required. But to invoke this line of cases there should first be introduced some evidence that the general practice of the industry is not a reasonably prudent practice. The plaintiff made no attempt to introduce such evidence. We thus are unable to save the verdict by assuming that the jury concluded the prevailing industry practice was an insufficient one. Such a conclusion would be improper for us to reach because there is no evidence in the record on which it might have been, or could be, based.

The issue here of appellant's negligence *vel non* turns on whether the scooter was readily accessible. Our dissenting colleague agrees with this formulation of the issue, but concludes that a reasonable jury might have found on the basis of the evidence that the scooter was not readily accessible to Barth and appellee as they inspected the train.

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[2] To the contrary, there was testimony tending to show that ordinarily car inspectors would note any open doors that one inspector could not close manually and would then report these open doors at the conclusion of their inspection; and that a scooter would then be dispatched with equipment to close all the doors reported by all the teams of inspectors that had worked on the train.

Established rules of evidence teach us that the appellee had the burden of producing evidence tending to show that the scooter was not readily accessible. McCormick, *Evidence* § 306 (1954). The appellee failed to meet this burden, which is not surprising because the issue of ready accessibility was not focused at the trial.[3] According to the dissent, the fact the scooter arrived ten minutes after Barth went for help and the fact Kimber could not with certainty remember whether he had asigned the scooter to assist the team of inspectors inspecting the Buffalo Extra[4] satisfied appellee's burden of production. We disagree. A reasonable man could only infer from the fact the scooter arrived ten minutes after Barth went for help that it was in the immediate area. After all, it took only ten minutes for Barth on foot to search out the scooter, wherever it was, acquaint the driver with the situation, and return with the scooter to the scene. There is no record evidence tending to show that "readily accessible" scooters invariably, frequently, or even sometimes, arrived earlier than ten minutes after they were summoned. On such a record, a scooter that appears within ten minutes after it is summoned must be considered to have been readily accessible. The only other bit of circumstantial evidence relied upon in the dissent as tending to prove that the scooter was not readily accessible to appellee and Barth was Kimber's statement that he was not sure whether he had assigned the scooter to assist the Buffalo Extra inspection team on the night of the injury.

[3] To the extent that appellee's trial counsel focused on the scooter issue, he attempted to ground appellant's alleged negligence on the failure of the scooter to accompany Barth and appellee.

[4] The dissent's statement that Kimber testified that he "had no idea where the scooter was at the time of the accident" is quite unfair. Kimber testified that he knew the scooter was in the yard where the Buffalo Extra was being inspected. He did admit on several occasions that he was honestly uncertain as to the scooter's exact location at the time of the accident.

Even if unanswered by the defendant[5] this evidence would not "justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." 9 Wigmore, *Evidence* § 2494, at 299 (3d ed. 1940). The desired inference is that the scooter was not readily accessible. Kimber's testimony, taken most favorably for the appellee,[6] is probative on this issue, if, but only if, the scooter would not be readily accessible to a given crew unless the foreman assigned the scooter to that crew. The record is devoid of evidence tending to establish this proposition.[7] Kimber's testimony that he was not sure of the scooter's location is therefore no more probative as tending to establish the railroad's negligence than it would be if given by a bystander.

If good industry practice is the test of an employer's diligence, and it should be the test in the absence of argument or proof to the contrary, the plaintiff must fail, for he has not shown that the scooter was not readily accessible. There is no evidence to justify a jury's determination that employer negligence played *any* role whatsoever in producing the harm the employee suffered. Compare *Gallick v. B. & O. R. R. Co.*, 372 U. S. 108 (1963). Inasmuch as the many F. E. L. A. cases cited by the plaintiff are dis-

[5] The statement in the dissent that appellant produced no evidence as to the whereabouts of the scooter should not be left unchallenged. Trial counsel for the appellant made much of the fact that the scooter arrived at the scene ten minutes after it was summoned. Surely this relatively speedy arrival tends to prove that the scooter was in the area. Does not the fact the secretary appears in her boss's office shortly after she has been summoned on the intercom tend to establish her presence in the outer office prior to the boss's call? Nevertheless, the majority opinion does not turn on our choosing between competing inferences. As we indicate in the body of this opinion, we have attempted to assess the probative worth of the Kimber testimony as if it had gone unanswered.

[6] See note 4, *supra*.

[7] Indeed, the thrust of the record evidence is that it was the customary practice for the scooter to be readily accessible to inspection crews, and that there was no reason for a foreman to take special steps to insure a scooter's accessibility.

tinguishable on this ground we need not review the jury's determination that this injury was reasonably foreseeable.[8]

We reverse and order that the judgment for the plaintiff be set aside and that judgment be entered for the defendant.

HAYS, *Circuit Judge* (dissenting):

I respectfully dissent.

In Federal Employers' Liability Act cases there is very little scope for appellate review of jury verdicts. "Judicial appraisal * * * is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that *negligence of the employer played any part at all* in the injury or death." (Emphasis added.) *Rogers v. Missouri Pacific R. R. Co.*, 352 U. S. 500, 506-07 (1957).

In the present case the facts are essentially uncontroverted and relatively simple. The inspection of the "Buffalo Extra" had been delayed and speed in carrying out the inspection was required. The train had been "humped"; some open doors were to be anticipated.

Terminal Supervisor Martin, a witness for appellant, indicated that he was "responsible for the safe, efficient, mechanical operation of all functions" in the yard. He testified that it is "good common railroad practice to have a motor car adjacent to the track that is being inspected." Martin's testimony concerning the need for the motor scooter, and its special door pulling equipment, to be readily accessible was corroborated by foreman Kimber.

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[8] If one assumes that railroad management ought to be aware that railroad employees deviate from ordinary safe practices in pursuing their labors, injuries like the one involved in the present case may well be foreseeable if each pair of inspectors is not accompanied by a scooter bearing heavy door closing equipment. But even if foreseeability of employee negligence can be equated with employer foreseeability of employee injury, employee injury, standing alone, is insufficient unless it can also be shown that the defendant's conduct deviated in some causative way from the standard of proper employer diligence. The plaintiff has failed to make such a showing in this case.

There was only one motor scooter assigned to the westbound advance yard. Only one train was being inspected the night of the accident. Supervisor Martin testified:

> "If there were only one train to be inspected and the motorcar was available, it would be good common sense to utilize that motorcar to expedite the handling and inspection of that train. That is the primary purpose of the motorcar."

Foreman Kimber agreed.

In reply to a question as to whether the motor scooter was "under your jurisdiction," foreman Kimber replied "Yes, absolutely." Nevertheless, Kimber testified that he could not remember whether or not he had assigned the motor scooter to accompany the inspectors, and had no idea where the scooter was at the time of the accident. Despite this damaging testimony, appellant produced no evidence as to the whereabouts of the scooter. Appellee could not reasonably have been expected to offer evidence as to the location of the scooter, especially since such information was "peculiarly in the knowledge of the adversary." McCormick, *Evidence* § 318 at 675 (1954).

The district court charged the jury:

> "Now all of those claims center around the claim that this motor car was not available. Now it is for you to determine whether that motorcar was or was not available in accordance with what would be the duty of the railroad to exercise reasonable care. That is one of the questions of fact that you will have to decide."

The scooter arrived at the scene of the accident a substantial amount of time, approximately ten minutes, after Kuberski was injured. In view of the time taken to secure the scooter, the jury could properly have found that it

was not readily available and that appellant had therefore negligently failed to supply appellee with necessary tools.

Both supervisory employees, Martin and Kimber, recognized that car inspectors would attempt to close doors manually; indeed, Kimber explained:

> "the procedure is for the four car-men or inspectors to come down the train and close whatever doors they can manually, and just push them aside, and if they can't on some occasions, they call to their partner who is on the other side to assist them."

It was therefore foreseeable that, because of the lack of appropriate tools, Kuberski would be called upon to cross from the south to the north side of the train. Given limitations of time, prior practice, and the natural propensity of employees to seek the quickest way, the appellant should have expected Kuberski to cross as he did rather than going over, under or around the train.

Certainly a jury was entitled to conclude that, because of appellant's negligent failure to provide the necessary tools, Kuberski was exposed to a substantial and foreseeable risk when he crossed the coupler in the darkness with only a hand lantern which shone above his head because he had to use both hands to clutch "grab irons." Appellant's failure to supply the motor scooter directly precipitated appellee's risk. Appellee's injury was, therefore, as the jury found, the direct and proximate result of appellant's negligence.

I would affirm.

Judgment Entered by Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of April one thousand nine hundred and sixty-six.

Present: Hon. J. Edward Lumbard, *Chief Judge,*
Hon. Sterry R. Waterman,
Hon. Paul R. Hays, *Circuit Judges.*

MICHAEL KUBERSKI,
Plaintiff-Appellee,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with instructions to set aside the judgment for the plaintiff-appellee and to enter judgment for the defendant-appellant in accordance with the opinion of this court with costs to the appellant.

A. DANIEL FUSARO, *Clerk.*